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2014; Dec. Dig. § 834.\* 7 Va.-W. Va. Enc. Dig. 158; 14 Va.-W. Va. Enc. Dig. 512; 15 Va.-W. Va. Enc. Dig. 463.]

**10. Homicide (§ 151\*)—Resisting Unlawful Arrest—Burden of Proof.**—Where an officer having a lawful warrant attempted to arrest accused, the presumption, in absence of evidence to the contrary, is that the officer discharged his duty in a lawful manner, and accused, resisting the arrest and killing the officer, has the burden of showing that the officer's conduct justified resistance.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 276-278; Dec. Dig. § 151.\* 7 Va.-W. Va. Enc. Dig. 137; 14 Va.-W. Va. Enc. Dig. 510; 15 Va.-W. Va. Enc. Dig. 462.]

Error to Circuit Court, Craig County.

Harvey D. Looney was convicted of murder in the first degree, and he brings error. Reversed.

*O. B. Harvey*, of Clifton Forge, and *Wm. E. Allen*, of Covington, for plaintiff in error.

*Samuel Williams*, Atty. Gen., and *J. P. Jones*, of New Castle, for the Commonwealth.

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PATRICK *v.* COMMONWEALTH.

June 16, 1913.

[78 S. E. 628.]

**1. Jury (§ 66\*)—Impaneling—Presence of Commonwealth's Attorney.**—Code 1904, § 4018, providing that the drawing of the names from the jury box to be placed on the jury list shall be in the presence of the presiding judge or, in his absence of one of the commissioners in chancery and a reputable citizen not connected with accused or prosecutor or, in case of homicide, with decedent, when read in connection with section 3146, authorizing the drawing of juries in civil cases in the presence of the attorney for the commonwealth, does not change the common-law rule that no one shall take part in the selection of jurors who does not stand indifferent to the parties, and it is improper for the commonwealth's attorney to be present during the drawing in felony cases.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 283-290; Dec. Dig. § 66.\* 9 Va.-W. Va. Enc. Dig. 32; 14 Va.-W. Va. Enc. Dig. 624; 15 Va.-W. Va. Enc. Dig. 588.]

**2. Jury (§ 66\*)—Impaneling—Statutory Provisions.**—Under Code 1904, § 4018, providing that names drawn from the jury box shall be placed on the list, and that, when 20 names have been drawn and placed on the list, the drawing shall cease, unless, for good cause shown in

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\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

a felony case, the presiding judge has directed more than 20 names, the action of the clerk in drawing and placing 30 names on the list is authorized in the absence of an order of the presiding judge.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 283-290, 306; Dec. Dig. § 66.\* 9 Va.-W. Va. Enc. Dig. 32; 14 Va.-W. Va. Enc. Dig. 624; 15 Va.-W. Va. Enc. Dig. 588.]

**3. Jury (§ 66\*)—Impaneling—Statutory Provisions.**—An order on the court's own motion, which directs the clerk in "drawing the list of venire facias for the trial of criminal cases" to draw the names of 30 persons and the sheriff to summon 26 from the list, is in violation of Code 1904, § 4018, authorizing the judge "for good cause shown in any felony case" to direct that more than 20 names be drawn and placed on the list and more than 16 persons summoned, and does not justify the clerk in drawing and placing 30 names on the list.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 283-290, 306; Dec. Dig. § 66.\* 9 Va.-W. Va. Enc. Dig. 32; 14 Va.-W. Va. Enc. Dig. 624; 15 Va.-W. Va. Enc. Dig. 588.]

**4. Jury (§ 82\*)—Impaneling—"Intentional Irregularities."**—The irregularity in drawing and placing on the list of more than 20 names without an order of court duly made is an intentional irregularity within Code 1904, § 4018, authorizing the drawing and placing on the list of only 20 names, unless the judge for good cause shown directs the drawing and placing of more names, and is not within the curative provision that no irregularity in drawing the names or in making the list shall be cause for summoning a new panel, or for setting aside a verdict, or granting a new trial, unless the irregularity was intentional.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 282, 307-309, 331, 332, 348, 359, 367, 380; Dec. Dig. § 82.\* 9 Va.-W. Va. Enc. Dig. 32; 14 Va.-W. Va. Enc. Dig. 624; 15 Va.-W. Va. Enc. Dig. 588.]

**5. Jury (§ 110\*)—Impaneling—Objections—Time to Make.**—An objection to the action of the court in not directing a venire facias to be issued to complete the panel, when a sufficient number of jurors was not obtained from the persons summoned and in attendance, not made until after verdict, comes too late, and a motion to set aside the verdict on that ground is properly overruled.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 502-513, 515-523; Dec. Dig. § 110.\* 9 Va.-W. Va. Enc. Dig. 33; 14 Va.-W. Va. Enc. Dig. 624; 15 Va.-W. Va. Enc. Dig. 588.]

**6. Criminal Law (§ 814\*)—Instructions—Applicability to Case.**—An instruction based on the theory that there was evidence that accused was at fault in bringing on the difficulty in which the homicide was committed is erroneous, when in fact there is no such evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821,

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\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979-1985, 1987; Dec. Dig. § 814.\* 7 Va.-W. Va. Enc. Dig. 155; 14 Va.-W. Va. Enc. Dig. 512; 15 Va.-W. Va. Enc. Dig. 463.]

**7. Jury (§ 66\*)—Impaneling—Statutory Provisions.**—The statute governing the selection of jurors should be complied with, and the fact that it is inconvenient to the court to do so, or that a compliance will cause a delay in the trial, does not justify a departure from the statute.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 283-290, 306; Dec. Dig. § 66.\* 9 Va.-W. Va. Enc. Dig. 32; 14 Va.-W. Va. Enc. Dig. 624; 15 Va.-W. Va. Enc. Dig. 588.]

**8. Constitutional Law (§ 70\*)—Judicial Functions—Wisdom of Statutes.**—The court must execute the legislative will, as evidence by plain statutes, without any regard to its own views as to the necessity or wisdom thereof.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129-132, 137; Dec. Dig. § 70.\* 3 Va.-W. Va. Enc. Dig. 183.]

Error to Circuit Court, Wise County.

Joshua Patrick was convicted of murder in the second degree, and he brings error. Reversed and remanded for new trial.

*Bond & Bruce*, of Wise, or plaintiff in error.

*Samuel W Williams*, Atty. Gen., for the Commonwealth.

CHESAPEAKE & O. RY. CO. *v.* CHAPMAN.

June 12, 1913.

[87 S. E. 631.]

**1. Appeal and Error (§ 197\*)—Variance—Writ and Declaration.**—Where plaintiff obtained leave to amend her declaration by increasing the ad damnum, and more specifically describing the land alleged to have been injured, but did not amend the writ, an alleged variance between the declaration as amended and the writ could not be reviewed on a writ of error, defendant not having cravedoyer of the writ nor made it a part of the record.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 197.\* 1 Va.-W. Va. Enc. Dig. 505; 14 Va.-W. Va. Enc. Dig. 81; 15 Va.-W. Va. Enc. Dig. 59.]

**2. Appeal and Error (§ 197\*)—Writ to Allege Error—Variance—Question Not Raised at Trial.**—Plaintiff having obtained leave to amend the ad damnum and description of the property alleged to have been injured in the declaration, but, having failed to amend the writ, defendant did not move for a continuance, nor indicate that it

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\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.